SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 357

ALVA B. DAVIS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

SUPPORTING BRIEF.

To the Honorable, the Supreme Court of the United States:

In support of his petition for writ of certiorari, the petitioner respectfully shows to the Court:

I.

Opinions of the Courts Below.

The opinion of the United States Circuit Court of Appeals in this case has not yet been reported, but appears in the record at pages 556 and 557, and in the Appendix hereto. The trial court filed no opinion.

II.

Jurisdiction.

(a) The opinion below was handed down on June 28th, 1940; petition for rehearing was denied on August 2nd, 1940.

(b) This Court has jurisdiction under 28 U. S. C. A. § 347(a).

(c) The jurisdiction of this Court is invoked upon the following grounds:

1. In holding that petitioner's assignment of error as to the action of the trial court in overruling his motion for continuance was purely technical and did not affect any of petitioner's substantial rights, the Circuit Court of Appeals decided an important question in the administration of federal criminal justice in a way in conflict with the applicable decisions of the Supreme Court, and particularly in conflict with the decision in *Bruno* vs. *U. S.*, 84 L. Ed. 158, Advance Opinion No. 3, October Term, 1939.

2. In holding that there was no merit in petitioner's complaint as to the action of the trial court in overruling his motion for continuance, the Circuit Court of Appeals sanctioned a clear abuse of discretion by the trial court which seriously infringed petitioner's right to a fair trial and an opportunity to present his defense, and decided an important question of general law in a way untenable and in conflict with the weight of authority.

3. In holding that petitioner did not question the sufficiency of the evidence to support the conviction and refusing to review the evidence, the Circuit Court of Appeals deprived petitioner of a valuable right of review, and so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

4. In holding, if indeed it has held, that the evidence was sufficient to support the judgment of conviction, the Circuit Court of Appeals has sanctioned a deprivation of petitioner's liberty and property without due process of law, and has sanctioned such a departure by the trial court from

the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

III.

Statement of the Case.

The Motion for Continuance. The indictment was returned on September 21, 1939, at a special term of the United States District Court for the Northern District of Texas, at Dallas (R. 1). It consisted of fourteen counts and contained more than thirty pages (R. 1-44). The first thirteen counts charged that petitioner and one L. J. Summerfield devised a scheme and artifice to defraud the several persons named in the indictment and others who could be induced to invest their moneys and properties in lands situated in Brewster and Presidio counties, Texas (R. 2). The scheme in substance, as alleged, was that the defendants would purchase waste lands in the counties aforesaid at a price of $1.00 and $1.50 per acre and by the use of highly colored and distorted maps of the counties and by false representations as to the character and value of the lands, would sell them to the persons to be defrauded at $10.00 per acre (R. 5-7); that by various means the defendants would represent and induce the persons to be defrauded to believe that the lands offered for sale had valuable oil and mineral possibilities and were fit for and adapted to agriculture and ranching, when as a matter of fact, the indictment alleged, the lands were waste and unfit for any purpose and wholly worthless as an investment (R. 6-8). It was further charged that "defendants were not conducting and would not conduct a business and enterprise in good faith, but on the contrary, said defendants were knowingly conducting and continued knowingly to conduct a mere dishonest and fraudulent land selling scheme, and were engaged in practices and a course of business which

would and did operate as a fraud and deceit on the persons to be defrauded" (R. 9). The scheme was particularly outlined in Count 1 of the indictment and referred to in the remaining counts. Each of the first thirteen counts charged the use of the mails in furtherance of the aforesaid scheme. The fourteenth count charged a conspiracy to commit the several substantive offenses charged in the preceding thirteen counts (R. 41).

Petitioner was arraigned on September 23, 1939, and the case set down for trial September 27, 1939 (R. 58). On the 23rd of September, 1939, petitioner filed a motion for continuance, alleging, among other things, that he was charged with selling lands which were worthless, representing them to be valuable, when they had no value as oil, gas or other mineral properties, which necessitated the negativing of the allegations, and that it was impossible for him to secure such proof in so short a time (R. 55). This motion was overruled on September 23, 1939 (R. 57). The case was later reset and called for trial on October 2, 1939 (R. 97).

It is set out in petitioner's notice of appeal (R. 63) and in the assignment of errors (R. 92 & 93), that on the 25th of September, 1939, petitioner caused subpoenas to be issued for witnesses, W. A. Craddock, C. D. Fromme, I. W. Queal, D. Sharp, Allen Graham, Wilbur Sweeten, Ronne McCorkle, E. G. Dean, E. E. Hundley and W. Wilson Graham, all of Dallas, Texas, to appear as witnesses in petitioner's behalf on September 27; that the United States Marshal made diligent effort to secure said witnesses but was informed that they were temporarily out of the city; that petitioner continued his efforts to locate and secure the presence of said witnesses for the trial, but was unable to do so (R. 92); that when the case was called for trial on October 2, none of the witnesses appeared (R. 93) and "in open court the defendant renewed his motion for continuance, alleging and set-

ting out the effort he had made to secure their presence for the trial of the cause, and alleging and setting out that they had been agents, selling land for defendant, A. Brown Davis, in a legitimate manner, and that they would, if present, testify that they were acquainted with the instructions given to agents by the said A. Brown Davis, and that it was the policy of the said A. Brown Davis to always instruct his agents never to misrepresent the value, location and prospects of the land sold by him and involved in this indictment, that he could not safely go to trial without said witnesses, and that he had no other witnesses present for trial of said cause by whom he might make this proof, which said motion for continuance so made and renewed the court then and there overruled and to which said action of the court the defendant then and there excepted".

The matters set out in the foregoing paragraph do not appear as a part of the bill of exceptions, and we do not find a formal motion containing the allegations referred to nor an order of the court overruling such motion, with exception.

The Sufficiency of the Evidence. For a statement of the character of the charges in the indictment, reference is made to the foregoing statement.

None of the persons alleged to have been defrauded testified that they had seen the lands and, of course, made no effort to put a value on it. The only witness introduced by the government who testified that he was familiar with Brewster and Presidio county lands was Otis Turner, a real estate man who lived in Alpine in Brewster County (R. 355). He testified that approximately a hundred wells had been drilled in the two counties for oil, but that none of them were producing. He said he knew of no agricultural products of the type which the indictment alleged defendants had represented the lands were adapted to produce

having been grown in either of the counties (R. 357). He testified that there was some drilling for oil in one of the counties at the time of the trial (R. 360), and that considerable acreage was held by various major oil companies (R. 361). He testified that at one time he sold petitioner a tract of land for $1.15 per acre and, in his opinion, that was all that particular tract was worth (R. 358). He testified that he knew of nothing that was going on at the time of the trial or that had been going on for the past three years that would cause land in either Brewster or Presidio County to be worth $10.00 per acre (R. 362).

J. W. Frazier, a witness for the defendant, testified that he was County and District Clerk of Brewster County (R. 375). He admitted on cross-examination by the District Attorney that he knew of no grapefruit being grown in either of the counties; and did not know of any cotton or sweet potatoes having been grown on any of petitioner's land; upon being handed photographs by the District Attorney (R. 383-385), he testified that Block G-12 of Brewster County, in which block the petitioner owned some land (R. 378), resembled the country depicted in the photographs (R. 381). He testified on cross-examination that cotton and sweet potatoes did grow in certain portions of Brewster and Presidio counties (R. 379) and in reply to a question by the judge said he had seen oranges growing in Presidio County just over the line (R. 388). He testified that when some of the oil wells were being drilled, there was considerable activity in the purchase and sale of royalties (R. 386); that the Atlantic Oil & Refining Company owns about 27,000 acres in Brewster County in fee (R. 386); and that Humble Oil & Refining Company has about 40,000 acres leased (R. 386).

Dr. P. E. Shershet, a witness for the defendant, testified that he was a mining engineer. In response to questions

by the District Attorney on cross-examination, he testified that he had made surveys in Brewster and Presidio counties; that he could not then say whether he would recommend the counties as a place to invest money or not (R. 395); that he was not qualified to make any estimate of the values of the lands in those counties (R. 397); that all the formations that produce oil in the Pecos area are present in the two counties (R. 398).

IV.

Specifications of Error.

1. The trial court abused its discretion in overruling petitioner's motion for continuance and putting him to trial in eleven days after indictment, at a time when he was unable to procure the attendance of witnesses he relied upon to assist in establishing his good faith in connection with the sale of his lands, and the Circuit Court of Appeals erred in holding that petitioner's complaint in this regard was without merit, purely technical and involved no substantial right of petitioner.

2. The Circuit Court of Appeals erred in refusing to examine the record to determine whether there was any evidence to support the conviction.

3. The Circuit Court of Appeals erred in holding that the record presents no reversible error, because the record clearly reveals that there was no evidence to support the conviction.

V.

Argument.

On the Motion for Continuance. Of course, a motion for continuance is addressed to the sound discretion of the trial court, whose action thereon will not be disturbed unless there is an abuse of discretion. But a defendant is entitled

to opportunity to make his defense; there is nothing technical about it—it is a substantial right. If the matters set out in the petitioner's notice of appeal and assignments of error concerning his motion for continuance alleged to have been presented on October 2, 1939, can be considered for any purpose, we think it is clear that the trial court did abuse its discretion in putting the petitioner to trial on October 2nd, and that the error was so prejudicial as to require reversal. Petitioner was charged with selling and offering to sell lands by making false representations as to their value and character, and that he was not conducting a business in good faith, but was conducting a mere dishonest and fraudulent land selling scheme which operated as a fraud and deceit upon people. He said he could show by his agents or salesmen, if they were present, that they were acquainted with the instructions he gave them and that it was his policy to always instruct them never to misrepresent the value, location and prospects of the lands offered for sale; he said he had no other witnesses present by whom he might make this proof. He said he caused subpoenas to be issued for the witnesses, who lived in Dallas, Texas, and they could not be located and were not present for the trial. We submit the testimony of these witnesses was material; that being indicted on September 23, 1939, and having issued his subpoenas on September 25, 1939, he was diligent, and when the trial court overruled his motion for continuance, because of the absence of his witnesses, and put him to trial on October 2, 1939, without his witnesses, the trial court abused his discretion and the petitioner was deprived of a fair opportunity to prepare and present his defense. Especially is this true since the indictment charged that petitioner was not conducting a business and enterprise in good faith, but was conducting a mere dishonest and fraudulent land selling scheme and was engaged in practices and a course of business which

operated as a fraud, and since the indictment and trial were built, as we believe, around the alleged false representations of the agent and defendant, Summerfield, made to Mrs. Nora M. H. Hartman, W. M. Springer, Mrs. Agnes Schrader and F. J. McBride. We think the testimony of the other salesmen as to the course of petitioner's business was material, when it appears that some 25,000 acres of land had been sold to between 900 and 1,100 persons.

On the Sufficiency of the Evidence. We are not unmindful of the fact that usually this Court declines to review evidence—that the volume of work which the Court faces requires it to husband its time. We are perfectly aware that in pressing here for a review of the evidence, we are asking the Court to assume a heavy burden. Nevertheless, we feel compelled to the action. No man, good or bad, ought to be condemned to imprisonment except upon an admission of guilt or upon substantial evidence of the crime charged. If the evidence in the record lacks real substance and amounts to no more than suspicion and surmise, this case ought to be reversed, we think, even though it requires the labors of this Court to do it.

As we have heretofore stated, we have not been able to determine whether or not the Circuit Court of Appeals reviewed the evidence. At the time it delivered its opinion, that Court had the impression that petitioner did not challenge the sufficiency of the evidence. It is true that the challenge was not among the assignments of error. But it did not have to be—if the judgment was without evidence to support it, it was fundamentally erroneous. When the court's attention was called to the supposed defect, we think that unquestionably it was its duty to examine it. In view of the language of the opinion and the fact that the petition for rehearing pointedly directed the court's attention to the lack of evidence and was overruled with-

out comment, we are not certain that the evidence was reviewed.

If we are correct in our conception of the essence of this indictment and if the scheme charged was, as we understand it,—that the defendants would acquire waste lands in Brewster and Presidio counties at $1.00 and $1.50 an acre and sell and offer it for sale for $10.00 an acre, and make false representations concerning the lands sold and offered for sale, and would falsely represent (R. 7 (1) that the lands were Texas oil lands and valuable Texas ranch properties, when in truth they were not, but were waste lands, unfit for any purpose, which had been purchased for $1.00 and $1.50 an acre and were being sold for $10.00 an acre; and would falsely represent (R. 7 (2) that the sale of the lands carried with it all surface and mineral rights, when in truth the mineral rights to many tracts had been reserved and were held by the State of Texas; and would falsely represent (R. 7 (3) that the land was well worth the price the purchasers were paying for it, $10.00 an acre, and that extensive oil development was under way in Brewster and Presidio counties, when in truth the land was worthless as an investment and there was no development of any charcter in the area in which the land was situated, and there was no justification in the claim that the land was worth the price the purchaser was paying for it, $10.00 an acre, but on the contrary, the land was hilly, waste land which had been purchased shortly prior thereto at $1.00 and $1.50 an acre; and would falsely represent (R. 8 (4) that the lands were highly productive and suitable for the growing of various crops and fruits, when it was not, but on the contrary, the lands were absolutely barren and would not produce any character of vegetation, and that the lands (R. 9) were worthless as a basis for investment, as the defendants knew, and that defendants were not conducting and would not conduct a business and enterprise

in good faith, but on the contrary, were knowingly conducting a mere dishonest and fraudulent land selling scheme and were engaged in practices and a course of business which would and did operate as a fraud and deceit on the persons to be defrauded—then we are in position to state to the Court that we have carefully examined the record and are entirely convinced that there was no substantial evidence to support the conviction.

We must be entirely frank with the Court. Petitioner's letters were written in an extravagant style, the representations he made were most alluring, and the literature, consisting of the Santa Fe News and other publications, contained articles not prepared by him but which were reproduced and used by him to present to his customers and prospective customers visionary ideas of Texas and its resources. We do not defend the letters, the publications or the representations of petitioner; our position is that, no matter how fraudulent one may surmise a series of acts to be or how repugnant to an enlightened intelligence the reading of petitioner's letters or the literature he sent out may be, he is entitled to a trial upon the issues made in the indictment, and, if the proof offered by the government failed to show that petitioner was guilty of what he was charged with, he should have been acquitted. *Hass* vs. *U. S.*, 93 F. (2d) 427.

It is true that the indictment charged that—"the defendant represented that the land sold and offered for sale carried with it all the surface and mineral rights, when in truth the mineral rights to many tracts had been reserved by the State of Texas"—and that the government showed by its witness, Mrs. Agnes Schrader, that she bought land three or four times, altogether about 430 acres (R. 260-263) and that the lands conveyed to her were out of Survey 26, Certificate 1018, Block 230 Brewster County (R. 308), and that the government showed that Miss Sadie M. Huber pur-

chased land twice, altogether about 57 acres, and that the lands conveyed to her were out of Survey 12, Certificate 962, Texas Central Ry. Survey, Presidio County (R. 285); and it is true that the government showed by its witness, I. A. Walker (R. 343-345), that these two surveys were classified in the Land Office of Texas as mineral and grazing land and sold by the State prior to 1931. If it is true that the minerals were reserved by the State of Texas under these two surveys, we say this is not sufficient to support the conviction, because the petitioner, Davis, bought an aggregate of approximately 30,000 acres of land in Brewster and Presidio counties and conveyed approximately 25,000 acres of it to between 900 and 1,100 persons. If only the two persons named, among the 900 to 1,100 purchasers of lands, acquired their tracts without the minerals, this would in our judgment be insufficient to show that petitioner had a plan or scheme to sell lands and falsely represent that the sale carried the full mineral rights.

It is true that the indictment charged that—"the scheme was to sell lands in Brewster and Presidio counties by making false representations, among others, concerning the profits made and to be made from the purchase of the lands and enormous dividends and profits from the purchase of the lands"—(R. top page 3), and that the government showed by its witness, Mrs. Nora M. H. Hartman (R. 148) that the defendant, Summerfield, a salesman, represented to her (in conversation with reference to her purchase of the land) that she would in a year from then (1936 or 1935) have all kinds of money and that she would not know what to do with it; and that the government witness, Springer (R. 175), said that Summerfield told him (about January, 1939) that the land he bought would be selling for $50.00 an acre in a few months; and that the witness, Mrs. Agnes Schrader, testified (R. 246) that Summerfield told her when she bought 380 acres of land for $3,800.00 (apparently in July, 1938) that in less than six or eight months her invest-

ment would bring her twenty, twenty-five or maybe thirty thousand dollars.

Assuming that these representations were made by the salesman, Summerfield, and that they were false, we believe they are not sufficient to sustain and conviction of petitioner for two reasons: First, petitioner, since he started to selling the lands in Brewster and Presidio counties, some four or five years prior to October, 1939, has sold between twenty and twenty-five thousand acres to between 900 and 1,100 persons (R. 435), and the fact that glowing and extravagant representations as to profits were made by the salesman to three people with reference to the profits to be made from their purchases, would be insufficient to show a scheme to sell lands in Brewster and Presidio counties by making false representations as to the profits to be made; and, second, it is not shown that petitioner authorized or knew that the agent selling the land was making extravagant and false representations as to the profits to be made from the purchase of the land. The petitioner timely and repeatedly objected to the representations made by salesmen as unauthorized (R. 108; R. 147; R. 157; R. 168).

The government does not attempt to show that petitioner authorized or knew that Summerfield was making representations as to the lands being grazing lands or that they would grow oranges and grape fruit, or that enormous profits and dividends would be quickly made from the purchase of this land. The government calls him (R. 528), as Mr. Davis referred to him: "The good will ambassador and the country-wide representative of the company" and, we presume, want it to be inferred or assumed that petitioner knew of these extravagant statements made by the salesman, Summerfield.

Criminal guilt is a personal thing; no one can be deprived of his liberty unless he himself commits the crime or in some way knowingly aids or participates in its com-

mission. This question was passed upon in *Beck* v. *U. S.*, 33 F. (2d) 107, in a mail fraud case. With regard to the introduction of evidence as to misrepresentations made by salesmen, the court said, in part:

> "Over repeated and vigorous objections, the court admitted evidence of conversations between a great many contract holders and a number of salesmen employed by the company, not had in the presence of Beck and not shown to have been authorized by him. The court announced early in the trial the theory on which the case was tried: 'But the ruling of the court is, what Mr. Barrett may have said or what the officers of the company of which he was president may have said, in the discharge of their duties in connection with that company, are binding upon the defendant'. This ruling was upon the evidence of one Shea, who was not an officer, but a salesman, and was adhered to throughout the trial.
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> In our opinion, this was error; if error, it was highly prejudicial, for the recollections of a procession of contract holders, mostly women, who had lost their money, of oral promises and representations made some four years before, were lurid and vivid. Guilt is personal and not vicarious. Except for certain regulatory offenses not involving moral turpitude, it is always an axiom of the criminal law that criminal intent is an essential ingredient of crime. It must be true that no man can be held liable for a false pretense or promise if he neither made the pretense nor authorized it. * * *
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> There was much evidence of that kind; e. g., contract holders testified that sales agents promised their houses would be completed in so many days and there was no proof that Beck authorized the promise or ever knew it had been made. As to some of these, material was on the ground and work begun prior to receivership. This testimony seems to be prejudicial as well as immaterial."

The indictment must allege not only that the persons devised a scheme or artifice to defraud, but must allege

clearly and distinctly what the artifice was, wherein the fraud consisted, and the circumstances by which it was to be accomplished. *U. S.* vs. *Hess*, 124 U. S. 483, 31 L. Ed. 516. The government elected to charge and assumed the burden of showing the falsity of the extravagant representations set out. No witness testified that he ever saw or knew the location of any land sold or offered for sale; there is no evidence in this record as to the character or value of any land sold or offered for sale; there is not a scintilla of evidence that the lands sold or offered for sale were, as the indictment charged, waste lands, unfit for any purpose, or that they were worthless, or that no development of any character was ever had in the area where they were located, or that they were hilly, waste lands, or that they were absolutely barren and would not produce any character of vegetation. The government must prove the falsity of the extravagant representations. *Little* vs. *U. S.*, 73 F. (2d) 861. It might truthfully be said that the government fell as far short of proving the falsity of the extravagant representations alleged in the indictment as the petitioner did at the trial to support the alleged false representations made by Summerfield to the purchasers of land.

The government did not discharge the burden of showing by substantial evidence that petitioner devised the scheme and artifice alleged, and we are apprehensive of departure from or relaxation of the settled rules for the trial of criminal cases, and think this case should be reviewed and reversed.

Respectfully submitted,

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